Supreme Court, U.S.
FILED

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CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term , 2001

CARL R. WAGENKNECHT ;
JACQUELINE J. MILLER-WAGENKNECHT
Petitioner,

V.

UNITED STATES; INTERNAL REVENUE SERVICE;
MAUREEN LIPPERT
Respondents

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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32 pg

QUESTION PRESENTED

Whether it is mandatory that when a party challenges the applicability of a statute to the court, the court must review the statute and its promulgated regulations in tandem pursuant to *United States v Mersky,* 361 U.S. 431 (1960) to determine if the statute is the applicable law and then provide a written opinion as to the court's determination.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2001

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioner, Carl R. Wagenknecht , respectfully petitions for a writ of certiorari to review judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The February 26, 2001 Memorandum of Opinion and Order of the United States District Court Northern District Of Ohio, Eastern Division is unreported and provided in Appendix A at page 10.

The February 26, 2001 Judgment Entry of the United States District Court Northern District Of Ohio, Eastern Division is unreported and provided in Appendix B at page 21.

The October 26,2001 Order of the United States Court Of Appeals For The Sixth Circuit is unreported and provided in Appendix C at page 22.

The February 18, 2002 Order of the United States Court Of Appeals For The Sixth Circuit is unreported and provided in Appendix D at page 27.

JURISDICTION

The Judgment of the United States Court Of Appeals for the Sixth Circuit was entered October 26, 2001. A timely petition for Rehearing En Banc was denied by the United States Court Of Appeals on February 18, 2002. This petition is timely filed within ninety days of that date, per Rule 13(1), Rules of the Supreme Court of the United States. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

Notifications required by Rule 29.4 (a) have been made.

CONSTITUTIONAL PROVISIONS

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; no shall private, property be taken for public use without just compensation.

STATEMENT OF THE CASE

This case involves a Petition To Quash third Party Summons. Carl R. Wagenknecht. (hereinafter "Petitioner") and Jacqueline J. Miller- Wagenknecht filed a Complaint / Petition

To Quash Summonses, Case No: 1:00 cv 2510. The Court below granted the United States, et al, (hereinafter "Respondents") Motion To Dismiss Or Summarily Deny Petition To Quash Summonses and For Enforcement Of Summons (Appendix B 21, 21). No discovery occurred.

Petitioner argued in his original complaint that the statute cited by Respondents as authorizing the issuing of third party summons did not apply to the instant case. Petitioner in his Brief in Opposition To Dismiss argued that *United States. v. Mersky, 361 U.S. 431 (1960)* was the accepted standard to analyze the applicability of the cited statute. The Court rejected Petitioner's assertion that the cited United States Code Section when read in tandem with the statute's promulgated regulations did not apply to the facts of this case.

The Court further held that the government had made the requisite showing pursuant to *United States v. Powell*, 379 U.S. 48 (1964) (Appendix A 10, 14-16) to issue said summonses.

On appeal Petitioner likewise argued to the United States Court of Appeals that the United States Supreme Court Case of *United States v. Mersky*, 361 U.S. 431 (1960) is controlling case law when determining the applicability of a United States Statute. The United States Supreme Court held in *Mersky, supra* that "the result is that neither the statute nor the regulations are complete without the other, and only together do they have any force. In effect, therefore, the construction of one necessarily involves the construction of the other". *id at* 438

The United States Court Of Appeals For The Sixth Circuit affirmed the United States District Court(Appendix C 22, 26) and ignored Petitioner's claim that *United States. v.*

Mersky, 361 U.S. 431(1960) is the controlling standard. The Appeals Court assumed as if axiomatic that the cited statute applied and did not review that statute in tandem with its promulgated/ implementing regulations to determine if the statute was in fact applicable. The Appeals Court went directly to *United States v. Powell* , 379 U.S. 48 (1964). (Appendix C 22, 23-25) .The Court of Appeals denied Petitioners Petition For Rehearing En Banc. (Appendix D 27, 27)

The result of the Court's decisions is that confusion exists as to whether or not *United States v. Mersky*, 361 U.S. 431 (1960) is still good case law. There exists a conflict as to whether or not a court is mandated to review a statute that has been challenged as to its applicability pursuant to *United States v. Mersky*, 361 U.S. 431 (1960).

REASON FOR GRANTING THE WRIT

The Court's Decision in this case directly conflicts with the United States Supreme Court case *United States v. Mersky*, 361 U.S. 431 (1960). *Mersky, supra* is cited throughout the circuits as the standard for analysis.(*See Drake v. Honeywell, Inc.*, 797 F.2d 603 (8th cir. 1986) , the court determined whether section 23(a) of the Consumer Product Safety Act creates a private cause of action for injury by reviewing in conjunction with its promulgated regulations.; *see Westchester Gen. Hosp. v. Dept. Of Health, etc.*, 464 F. Supp 236 (1979) that provides a standard for reviewing Administrative Regulations. *Mersky* provides the first of the three substantive standards; *see United States v. Walter Dunlap & Sons Inc.* 800 F2d. 1232 ; *see West Allis Memorial Hosp. Inc. v. Bowen* 852 F.2d 251 (7th cir 1988); cases citing *Mersky* to numerous).

The United States Court Of Appeals For the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings as well as sanctioning such a departure by a lower court as to call for an exercise of this Court's supervisory power.

Furthermore there exists confusion among Courts as to whether or not a statute must be reviewed in conjunction with its promulgated regulations. There is a square conflict among the Courts of appeals regarding the question presented. This conflict permeates the federal court system. (*see United States v. Powell* , 379 U.S. 48 (1964) which did not apply *Mersky*)

The need for guidance from this Court is acute. This case is timely and provides a rare opportunity to provide that guidance. The public at large as well as the legal profession must know whether or not the court can arbitrarily decide if a statute's promulgated regulations must be viewed with a cited statute or if the statute can be taken as standing alone independent of any promulgated regulations when determining if the statute is the applicable law. Ultimately the issue becomes one of due process .(see fifth amendment)

The ramifications of this Court's decision far overshadows the final outcome of this instant case. If this decision is left to stand then due process of law is undermined and put into question.

Furthermore, if *United States v. Mersky*, 361 U.S. 431 (1960) is not upheld as the standard then any government representative or agent could use any statute by merely providing a self-serving affidavit . Then presto, the statute applies to whomever that government representative or agent alleges that the statute applies whether or not the statute's promulgated regulations support such allegation. Furthermore,

the Ninth Circuit Court of Appeals currently promotes such conduct. In *Liberty Financial Services v. United States*, 778 F.2d 1390 (9th Cir. 1985) the Appeals court held that the statute governing judicial enforcement of IRS summons must be read broadly in order to ensure that enforcement powers of the IRS are not unduly restricted. The Court ignored the statute's implementing/ promulgated regulations.

Finally if *United States v. Mersky*, 361 U.S. 431(1960) is applied to this case sub judice then the decision below is erroneous.

A. The Sixth Circuit's Holding Conflicts with *United States v. Mersky*, 361 U.S. 431(1960)

A statute is merely enabling legislation and not necessarily a congressional mandate. *Lane v. Lincoln County Hospital*, 537 F. Supp. 114, 120 (1982). A statute authorizes an action to occur but does not necessarily require that the act take place. *Id.* at 121 n.7

Interpretive rules do not have the force and effect of law since they are statements of policy issued by an agency asserting its construction of the statute or regulation. *United States v. Walter Dunlap & Sons Inc.* 800 F2d. 1232 , 1233 headnote 3 (3rd Cir. 1986) Whereas substantive regulations may have the force of law if they are authorized by congress and promulgated by an agency to implement the statute. *Id* at 1233, headnote 4 . However administrative rules and regulations which purport to implement a statute must be consistent with the statute under which they are promulgated. *Florida Medical Ass'n v. Dept. Of Health, Ed. Etc.*479 F. Supp. 1291, 1294 Headnote 26

(1979).

In *United States v. Mersky*, 361 U.S. 431, 437-438 (1960), the United States Supreme Court held that:

> " An administrative regulation, , of course, is not a ' statute'. While in practical effect regulations may be called ' little laws' , they are at most offspring of statutes... **Here the statute is not complete by itself , since it merely declares the ranges of its operation and leaves to its progeny the means to be utilized in the effectuation of its command.** But it is the statute which creates the offense of the wilful removal of the labels of origin and provides the punishment for violations. The regulations, on the other hand, prescribe the identifying language of the label itself, and assign the resulting tags to their respective geographical areas. **Once promulgated, these regulations, called for by the statute itself, have the force of law**, and the violations therefore incur criminal prosecutions, just as if all the details had been incorporated into the congressional language. **The result is that neither the statute nor the regulations are complete without the other, and only together do they have any force. In effect, therefore, the construction of one necessarily involves the construction of the other."** (Emphasis added)

Hence, when a statute is challenged as not being the applicable law , the reviewing court must read the statute and its implementing regulation in tandem. *United States v. Mersky*, 361 U.S. 431 (1960). Furthermore a reviewing court is not

free to set aside regulations simply because it would have interpreted the statute in a different manner. *Batterton v. Francis*, 432 U.S. 416, 425 (1977).

In *Coffman v. Trickey*, 884 F.2d 1057 (8th Cir. 1989), prisoner Coffman brought action alleging that prison official Trickey violated his constitutional and statutory rights in imposing punishment. The eighth Circuit Court Of Appeals held that " a fundamental tenet of due process is that to be sanctioned one must have received fair notice that one's allegedly violative conduct was prohibited". *Id* at 1060 The Court further held that:

> "Since Coffman was punished for violating a rule which prohibits the violation of a published rule, it was incumbent on Trickey to point to the precise published rule that was violated. **Without being coupled to a published rule, rule 29, standing alone, means nothing or at least would be void for vagueness.** *Interstate Circuit Inc. v. City of Dallas*, 390 U.S. 676, 682-91, 88 S. Ct. 1298, 1302-07, 20 L.ED.2d 225(1968); 440-441, 80 S.Ct. 459, 464-65, 4 L.Ed 2d 423 (1960) That Coffman's conduct was " a planned situation" does not alter the requirement that Trickey must show that Coffman's conduct knowingly violated a published institutional rule." *Id.* at 1060. (Emphasis added)

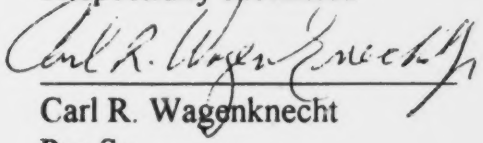
Hence, Petitioner has a fundamental and constitutional right to know if the cited statute is in fact the applicable law. The standard set forth in *United States v. Mersky*, 361 U.S. 431 (1960) guarantees such rights.

The Appeals Court abused its discretion when it did not apply the *Mersky* standard. Furthermore, such action by the Appeals Court would constitute clear error. The decision of the Appeals Court resulted in an Order that was in conflict with *United States v. Mersky*, 361 U.S. 431 (1960) .

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted



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APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Carl R. Wagenknecht, et al.,	)CASE NO. 1:00 cv 2510
	)
Plaintiff,	) JUDGE PATRICIA A.
	) GAUGHAN
	)
vs.	)
United States, et al.,	) **Memorandum of**
	) **Opinion and**
	) **Order**
	)
	) Filed
Defendant.	) 01 Feb 26 A.M. 11:41
	) Cleveland

Introduction

This matter is before the Court upon United States' Motion to Dismiss or Summarily Deny Petition to Quash Summonses and for Enforcement of Summonses (Doc. 11). This case arises out of two summonses re-issued to banks in connection with an audit of petitioners' tax liability. For the following reasons, the Motion is GRANTED.

Facts

Petitioners, Carl R. Wagenknecht and Jacqueline J. Miller-Wagenknecht (collectively referred to as "petitioners"), filed this Complaint and Petition to Quash Summons, *pro se*,

against defendants, United States, Internal Revenue Service (hereafter, IRS) and Maureen Lippert, seeking to quash two IRS summonses to Third Federal Savings and Loan Association and Ohio Savings Bank issued on September 12, 2000.

As explained hereafter, this matter actually involves, the re-issuance of the summonses which were originally the subject of a matter before United States District Judge Oliver. By letters of May 12, 2000 and June 7, 2000, Revenue Agent Maureen Lippert notified petitioners that the IRS may have to contact third parties with respect to the determination of petitioner's; tax liability for the taxable year 1996. The June 7 letters advised petitioners that failure to provide requested information by June 26 would result in contact of third parties, (defts. Exs. 1,2, and 3). On July 6, 2000, Lippert issued summonses to Third Federal and Ohio Savings. (Lippert decl.). Petitioners filed a petition to quash these summonses on July 25, 2000. The case was assigned to Judge Oliver and asserted that certain attachments were not included with the summonses. Lippert, to correct this perceived defect, issued a second set of summonses on September 12, 2000, sending notice to petitioners. (Id.). By letter of September 12, an attorney for defendant notified petitioners of the re-issuance and stated, "In order to avoid mooting your Petition to Quash Summonses, the original summonses have not been withdrawn; thus, if you intend to challenge the new summonses, you may do so without either filing a new action or paying a new filing fee.: (deft. Ex.4). However, petitioners chose not to supplement their first petition and filed the herein second separate action. The IRS then withdrew the original summonses on October 23, 2000 and the attorney for defendant moved to dismiss the first petition as moot. Judge Oliver granted the motion on October 31 stating

that the summonses had been superceded and withdrawn. (Court docket).

This matter is now before this Court with respect to the re-issued summonses. Lippert's declaration sets forth the following facts. In her capacity as Revenue Agent, she is conducting an examination of petitioners' joint income tax liability for the year 1996. In furtherance of this examination and in accordance with 26 U.S.C. 7603 and 7609(a)(2) she served the summonses at issue as it is necessary to obtain testimony and to examine the books, papers, records or other data to properly investigate the tax liability. She also served petitioners the noticed required by 26 U.S.C. 7609(a) which included copies of the summonses and attachments served on the banks. Lippert declares that with the exception of documents she received prematurely from Third Federal and a copy of a check which was cashed and deposited at Ohio Savings, the books, papers, records, or other data sought by the summonses were not already in the possession of the IRS. She further declares that she took all administrative steps required by the Internal Revenue Code with respect to the summonses and that the present investigation of petitioners is not the subject of a referral to the United States Department of Justice. (Lippert decl.).

Petitioners set forth a rather lengthy recitation of facts which is almost entirely unsupported by evidence. Therefore, these facts will not be discussed here. To the extent they are relevant to petitioners' arguments, they will be discussed *infra.*

Discussion

(A) proper parties

Defendants first argue that defendants Internal Revenue Service and Maureen Lippert are improper parties to this action

and should be dismissed, the only proper party being the United States of America. This Court agrees.

"When an action is one against named individual defendants, but the acts complained of consist of actions taken by defendants in their official capacity as agents of the United States, the action is in fact one against the United States." *Atkinson v O'Neill*, 867 F.2d 589. 590 (10th dir. 1989), *citing Burgos v Milton*, 709 F.2d 1,2 (1st Cir. 1983), *Hawaii v. Gordon*, 373 U.S. 57, 58, 83 S.Ct. 1052, 1053, 10 L.Ed2d 191 (1963) (relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter) and *Gilbert v. DaGrossa*, 756 F.2d 1455,1458 (9th Cir. 1985) (suit against IRS employees in their official capacities is a suit against the United States).

Therefore, Revenue Agent Lippert is not a proper party.

Nor is the IRS a proper party. "Because Congress has not constituted the IRS as a body corporate and has not authorized suit against the IRS in its given name, an action against the IRS is deemed to be one against the United States." *Gardens v. U.S.*, 1997 WL873545, *1 (W.D.Mo. 1997), *citing Freck v. Internal Revenue Service*, 37 F.3d 986, 988 n. 1 (3d Cir.1994) (citing cases) and *Jibunor v. Internal Revenue Service*, No. 3-93-578, 1994 WL 317637 (D.Minn. March 7, 1994). *See also Johnson v. Treasury Dept.*, 917 F.Supp.813, 816 (N.D.Ga. 1995) ("Naming the Internal Revenue Service as a defendant in this action is inappropriate."

Therefore, the United States is the only proper party and the remaining defendants are dismissed.

(B) whether the summonses should be quashed

Petitioners are challenging two third-party summonses issued by the IRS. Section 7602 of the Internal Revenue Code

gives the IRS the authority to summon any person or document(s) that may be relevant to a tax investigation. The code provides in pertinent part:

> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized --...
> [t]o summon...any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data...as may be relevant or material to such inquiry.

26 U.S.C. 7602(a)(2).

The Sixth Circuit has set forth the pertinent analysis herein:

> In *United States v. Powell*, 379 U.S. 48 (1964), the Court set forth the standard by which an IRS summons would be judged and the burdens for both the government and the party seeking to quash the summons. In order to have an IRS summons enforced, the government must show that (1) the investigation will be conducted pursuant to a legitimate purpose; (2) the inquiry may be relevant to the purpose; (3) the information sought is not already within the IRS's

> possession; and (4) that the administrative steps required in 26 U.S.C 7603 have been followed. *see id.* At 57-58; *see also United States v. Will*, 671 F.2d 963, 966 (6th Cir.1982) (*citing Powell*). 'The requisite showing is generally made by the submission of the affidavit of the agent who issued the summons and who is seeking enforcement.' *Will*, 671 F.2d at 966.
>
> Once the government has made the requisite showing, the burden shifts to the taxpayer to demonstrate that it would be an abuse of the court's process to enforce the summons. *See id; Kondik v. United States*, 81 F3d 655, 656 (6th Cir.1996) ('the burden shifts to the taxpayer to prove that enforcement of the summonses would be an abuse of the court's process. This burden is a heavy one.') (citations omitted). In *Powell*, the Court said that '(s)uch an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation.' 379 U.S. at 58; *accord Will*, 671 F.2d at 967,

Cypress Funds, Inc. V. United States, No. 99-3840, 2000 WL 1597833 (6th Cir. 2000).

As stated above, "The requisite showing is generally made by the submission of the affidavit of the agent who issued the summons and who is seeking enforcement." *Will*,671 F.2d at 966. Revenue Agent Lippert's declaration satisfies the four requirements. The summonses were issued for the legitimate purpose of determining tax liability. That data sought was

relevant to the proper investigation of the tax liability. With the two exceptions stated in the declaration, the data sought was not already in the government's possession. Lippert further declared that the documents received prematurely from Third Federal were segregated and returned unexamined and unused and the copy of the check deposited with Ohio Saving was received from a third party, who had not been summoned, during the period July 6 through September 12, 2000. Finally, Lippert's declaration shows that the administrative steps have been followed.

As the government has made the requisite showing, the burden shifts to petitioners to demonstrate that it would be an abuse of the court's process to enforce the summons. As discussed above, such an abuse can be shown if the summons had been issued to harass the taxpayer or for any other purpose showing bad faith.

Petitioners assert that the summonses were invalid because the applicable United States Code sections, discussed above, and their implementing regulations, apply only to alcohol, tobacco and firearms, the sale of manufacture of which petitioners have never been involved.

Such an argument has been expressly rejected by at least two federal courts of appeals . In *United States v. Ross,* No. 93-1010, 1995 WL 218539 (7th Cir. 1995), defendant made the same argument that petitioners herein are advancing. The court stated,

> [Defendant] contests the admission of evidence at trial obtained by the government through summonses pursuant to 26 U.S.C 7602. He reasons that 7602 is paired with regulations in the "CFR Table I" which

> pertain to the Bureau of Alcohol, Tobacco, & Firearms. Because he is not charged with a crime relating to alcohol, tobacco, or firearms, he argues that any evidence obtained with these summonses should not have been admitted. [Defendant's] claim is wholly without merit. Section 7602 'authorizes the IRS to issued administrative summonses involving both the civil and criminal elements of tax laws.' *United States v. Becker*, 965 F.2d 383, 390 (7th Cir. 1992)."

Likewise, in *Stamos v. United States*, No. 88-15273, 1990 WL 43007 (9th Cir. 1990), petitioner sought to quash a third-party summons on the same ground and the court concluded.

> [Petitioner] claims that the summons issued pursuant to section 7602 may be issued only in connection with a tax liability involving alcohol, tobacco, firearms, or explosives. Because [petitioner] is involved in no such activity, [petitioner] contends the summons issued against him pursuant to the authority of 26 U.S.C 7602 was invalid...[Petitioner] is incorrect. No such restriction exists on a section 7602 summons.")

See also Hogan v. United States, 873 F.Supp 80 (S.D.Ohio 1994), where in it is stated, "Petitioner's argument that[7602] applies only to Alcohol, Tobacco, and Firearms activities has been uniformly rejected [by] the courts." *Citing United States v. Street*, 791 F. Supp 563 (D.Md. 1992), ("The patent flaw in the argument is that the cited ATF regulations are not the exclusive source of the government's authority to issue summonses under 7602 of the Code. Section 7602 authorizes

the Secretary of the Treasury to issue summonses for the purposes of determining the tax liability of 'any person.'").

Accordingly, petitioners' argument that the summonses were invalid for lack of authority or jurisdiction is rejected.

Next, petitioners attempt to demonstrate the government's bad faith. While essentially lacking in evidentiary support and consisting of a prolix narrative without the benefit of chronological order, the Court will attempt to convey petitioners' assertions.

Apparently, petitioners were audited in 1996. Petitioners assert that the revenue agent conducting the audit abused and harassed them and violated their constitutional rights. Petitioners contend that the revenue agent sought to undermine a lawsuit Jacqueline Miller-Wagenknecht had filed against the city's tax administrator and its mayor. Petitioners state that the may is an IRS agent and a co-worker of the revenue agent conducting the audit. Apparently, the lawsuit [not filed until 1997] alleged malicious prosecution arising out of two criminal complaints the tax administrator had filed against Jacqueline in 1995 and 1996. Petitioners then brought allegations regarding the revenue agent's conduct to the attention of her superiors. In 1999, petitioners met with IRS representatives regarding their allegations. One IRS representative indicated that all proceedings would be suspended until the matter of their allegations was resolved. A new audit, involving the subject matter here in, was then instituted in 2000 with the assignment of a different agent. Revenue Agent Lippert scheduled a meeting with petitioners, but then proceeded to issue the July 2000 subpoenas in advance of the meeting. Based on these assertions, petitioners make the following arguments in an attempt to demonstrate bad faith.

Petitioners assert that Lippert's commencement of a second audit while the first had not been concluded shows bad faith inasmuch as it was intended to harass petitioners for bringing the allegations against the former revenue agent. However, Lippert has declared that the subject summonses were issued in connection with an examination of petitioners' joint income tax liability for the taxable year 1996. Any conjectures by petitioners are speculative and do not support a finding of bad faith.

Petitioners also question why Lippert would schedule a meeting and then issue the summonses without waiting for the meeting. Again, however, Lippert was conducting the examination and petitioners point to no prohibition against issuing summonses prior to a meeting.

Finally, petitioners attempt to raise an issue of bad faith by questioning Revenue Agent Lippert's interchangeable use of the terms "examination" and "investigation." The Court sees no basis for bad faith in this argument.

In addition to the arguments raised in their brief, petitioners raised several arguments in their Petition. While defendant addresses these arguments in its Motion, petitioners do not discuss them further. The Court will briefly address them.

Petitioners assert that the summonses did not include the attachments. However, petitioners point to the first summonses which were corrected by the second summonses which included all the attachments.

Petitioners assert that the summons for Ohio Savings Bank is overly broad because it does not identify "with specificity whether joint accounts or individual accounts and or accounts as related to the 1996 return sought to be audited."

(Pet. Para. 6) However, the United States Supreme Court has stated, "The language [of section 7602] 'may be' reflects Congress' express intention to allow the IRS to obtain items of even potential relevance to an ongoing investigation, without reference to its admissibility. The purpose of Congress is obvious: the Service can hardly be expected to know whether such data will in fact be relevant until it is procured and scrutinized." *U.S. v. Arthur Young & Co.* 465 U.S. 805, 814, 104 S.Ct. 1495, 1501 (1984). As such, because an audit of petitioners' tax liability was being conducted, the IRS would not be expected to limit its summonses to specific documents.

Petitioners assert that the summonses served on Jacqueline Miller-Wagenknecht were not originals nor did they have any attachments. Again, petitioners are pointing to the July 6 summonses which were then superceded. (Pet. Exs 1A and 2A). Furthermore, Section 7609 only requires that a copy of the summons accompany the notice to the petitioner. This ground has no merit.

Because petitioners had failed to carry their burden, defendant's Motion is granted.

Conclusion

For the foregoing reasons, United States' Motion to Dismiss or Summarily Deny Petition to Quash Summonses and for Enforcement of Summonses is granted.

IT IS SO ORDERED

/S **PATRICIA A. GAUGHAN**
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Carl R. Wagenknecht, et al.,	**)CASE NO.1:00CV2510**
Plaintiff,	**)**
	) JUDGE PATRICIA A.
	) GAUGHAN
vs.	**)**
	) Judgment Entry
United States, et al.,	**)**
	) Filed
Defendant.	**) 01 Feb. 26 A.M. 11:41**
	) Cleveland

This Court, having issued its Memorandum of Opinion and Order granting United States' Motion to Dismiss or Summarily Deny Petition to Quash Summonses and for Enforcement of Summonses (Doc. 11), hereby enters judgment for defendants and against plaintiff.

IT IS SO ORDERED.

/S PATRICIA A GAUGHAN
United States District Judge

APPENDIX C

No. 01-3323

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CARL R. WAGENKNECHT; JACQUELINE J. MILLER-WAGENKNECHT,	)	
Plaintiffs-Appellants,	)	
v.	)	ORDER
UNITED STATES OF AMERICA; INTERNAL REVENUE SERVICE; MAUREEN LIPPERT,	)	FILED OCT 26, 2001 LEONARD GREEN CLERK
Defendants-Appellees.	)	

Before: MARTIN, Chief Judge; CLAY, and GARWOOD,* Circuit Judges.

Carl R. Wagenknecht and Jacqueline J. Miller-Wagenknecht, pro se Ohio residents, appeal a district court

*The Honorable Will L. Garwood, United States Circuit Judge for the Fifth Circuit, sitting by designation.

judgment dismissing their complaint seeking to quash administrative summonses issued by the Internal Revenue Service (IRS) pursuant to 26 U.S.C. 7602. This case had been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed.R.App.P.34(a).

Seeking injunctive relieve the Wagenknechts sued the United States, the IRS, and IRS agent Maureen Lippert seeking to quash administrative summonses issued by the IRS to Third Federal Savings and Load Association, an Ohio Savings bank. They also sought to enjoin the government from the issuance of further summonses. The summonses were a result of an IRS investigation in the Wagenknechts' federal income tax liability for 1996. The government moved to dismiss the petition and to enforce the summonses. The court subsequently granted the government's motion.

In their timely appeal, the Wagenknechts argue that the district court erred by misstating the applicable law, that it failed to examine all the evidence, and that it should not have dismissed the IRS and Lippert as defendants.

A district court's grant of a motion to enforce an IRS summons will only be reversed if there is clear error. *See Fortney v. United States*, 59 F.3d 117, 119 (9th Cir. 1995). Likewise, the denial of a petition to quash an IRS summons is reviewed for clear error. *See id.* When reviewing for clear error, this court must affirm the district court's order "unless we are left with the definite and firm conviction that a mistake has been committed.": *Alexander v. Local 496, Laborers' Int'l Union of N. Am.*, 177 F.3d 394, 402 (6th Cir. 1999), *cert. denied*, 528 U.S. 1154 (2000).

Twenty-six U.S.C. 7602 gives the IRS the authority to summon any person or documents that may be relevant to a tax investigation. The code provides in pertinent part:

> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized - . . . [t] summon...any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data...as may be relevant or material to such inquiry.

26 U.S.C. 7602(a)(2).

In *United States v. Powell*, 379 U.S. 48 (1964), the Court set forth the standard by which an IRS summons would be judged and the burdens for both the government and the party seeking to quash the summons. In order to have an IRS summons enforced, the government must show that: (1) the investigation will be conducted pursuant to a legitimate purpose; (2) the inquiry may be relevant to the purpose; (3) the information sought is not already within the IRS' possession; and (4) the administrative steps required in 26 U.S.C. 7603 have been followed. *See id.* At 57-58; see also *United States v. Will*, 671 F.2d 963, 966 (6th Cir. 1982). "The requisite showing is generally made by the submission of the affidavit of the agent who issued the summons and who is seeking

enforcement." *Will*, 671 F.2d at 966.

Once the government has made the requisite showing, the burden shifts to the taxpayer to demonstrate that it would be an abuse of the court's process to enforce the summons. *See id.; Kondik v. United States*, 81 F.3d 655, 656 (6th Cir. 1996) ("the burden shifts to the taxpayer to prove that enforcement of the summonses would be an abuse of the court's process. This burden is a heavy one."_ (citations omitted). In *Powell*, the Court said that "[s]uch an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute , or for any other purpose reflecting on the good faith of the particular investigation." *Powell* , 379 U.S. at 58; *accord Will*, 671 F.2d at 967.

The district court found that the affidavit of agent Lippert satisfied the requirements of *Powell*. Specifically, the court found the affidavit established a legitimate investigation was being conducted; the inquiry was for a relevant purpose; with two exceptions, the evidence was not in the IRS's possession; and the administrative steps required by 7603 had been followed. As the district court's conclusion is supported by the evidence, the burden shifted to the Wagenknechts to demonstrate an abuse of the court process to enforce the summonses. *See Will*, 671 F.2d at 966. The Wagenknechts' had not satisfied this burden. Accordingly, the district court did not err in denying the Wagenknechts' motion to quash the IRS's summonses.

The Wagenknechts also assert that the IRS and agent Lippert should not have been dismissed as defendants. However, as the acts of Lippert and the IRS were on behalf of the United States, the United States is the only proper party to

the action. *See Atkinson v. O'Neill*, 867 F.2d 589, 590 (10th Cir. 1989); *Burgos v. Milton*, 709 F.2d 1,2 (1st Cir. 19823) . Thus, Lippert and the IRS were properly dismissed as defendants.

Accordingly, we affirm the district court's judgment. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

S/ LEONARD GREEN
Clerk

APPENDIX D
01-3323

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CARL R. WAGENKNECHT, ET AL.,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	ORDER
	)	
UNITED STATES OF AMERICA, ET AL.,	)	FILED
	)	FEB. 18, 2002
Defendants-Appellees.	)	LEONARD
	)	GREEN, CLERK

BEFORE: MARTIN, Chief Judge; CLAY and GARWOOD,* Circuit Judges.

The court having received a petition for rehearing an banc, and the petition having been circulated no only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing an banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

S/ Leonard Green
Leonard Green, Clerk

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*Hon. Will L. Garwood, Senior United States Circuit Judge for the Fifth Circuit Court of Appeals, sitting by designation.